



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In re

Scranton Times-Tribune
Bob Casey for Pennsylvania Committee,
and Vanessa DeSalvo Getz, as treasurer

MUR 5679

**STATEMENT OF REASONS OF VICE CHAIRMAN DAVID M. MASON AND
COMMISSIONER HANS A. von SPAKOVSKY**

The matter arises from a complaint filed by the Republican State Committee of Pennsylvania. The Commission voted unanimously to find no reason to believe ("RTB") that Respondents violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*,¹ and we write separately regarding the applicability of the press exemption.

I. BACKGROUND

In the process of merging two local newspapers – the *Scranton Times* and *The Tribune* – into the *Scranton Times-Tribune*, the newspaper's owner, Scranton Times LLP, engaged a consumer research organization and an advertising agency to develop a *Times-Tribune* prototype for use in an advertising campaign clearly designed to inform readers (and potential readers) of the merger and the new product. The prototype newspaper in the advertisement included a depiction of the new front page, complete with a faux story under the banner headline "Casey to Run for Senate."²

The complaint alleges:

- The *Times-Tribune* violated FECA by using corporate general-treasury money in expressly advocating Robert Casey Jr.'s election. *See generally id.* § 441b(a) (2002).
- The *Times-Tribune* omitted the required disclaimer from the ad, *see generally id.* § 441d(a)(2)-(3), (c) (2002), and
- Respondents coordinated the content, timing, and placement of the ad. *See generally id.* § 441b(a); *id.* § 441a(a)(7)(B)(i) (2002).³

¹ Voting affirmatively were Commissioners Lenhard, Mason, von Spakovsky, Toner, Walther, and Weintraub.

² *See* First Gen Counsel's Rep ("GCR") at 2-3 (Sept. 5, 2006).

³ GCR at 2. 4

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II. DISCUSSION

While the Commission was correct in accepting the Office of General Counsel (“OGC”) recommendation to find no RTB,⁴ OGC’s analysis of whether the allegations in the complaint were true was immaterial because the press exemption applies to this case.

FECA prohibits corporations from making contributions or expenditures from their general treasury funds in connection with a Federal election. 2 U.S.C. § 441b. FECA and Commission regulations, however, establish several exemptions to this general rule, including the press exemption, which the Commission has recently considered on several occasions. *See, e.g., In re Kobylt*, Matter Under Review (“MUR”) 5569, Statement of Reasons (“SOR”) of Chairman Toner & Comm’rs Mason & von Spakovsky at 2-3 (F.E.C. March 17, 2006);⁵ *In re Ross*, MUR 5555, SOR of Chairman Toner & Comm’rs Mason & von Spakovsky at 2-6 (F.E.C. March 17, 2006);⁶ *In re CBS Broadcasting, Inc.*, MURs 5540, 5545, 5562 & 5570, SOR of Comm’rs Mason & Smith at 3-10 (F.E.C. July 12, 2005).⁷

Under the press exemption from the definition of “contribution,” 11 C.F.R. § 100.73 (2002),

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate....”

A parallel exemption applies with respect to any cost incurred that might otherwise constitute an “expenditure.” *See* 2 U.S.C. § 431(9)(B)(i); 11 CFR 100.132.

The press exemption applies broadly – not only to the pages of a publication or to the content of a newscast, but also to activities undertaken by a press entity “that fall broadly within the press entity’s legitimate press function.” *Reader’s Digest Ass’n v. FEC*, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981) (referring to alleged corporate expenditures); *see also CBS Broadcasting*, SOR of Comm’rs Mason & Smith at 8 (quoting *In re CBS News*, MUR 4946, SOR of Chairman Wold & Comm’r Mason at 1-2 (F.E.C. June 30, 2000)⁸). This “legitimate press function” concept, rather than limiting the press exemption, *cf. CBS Broadcasting*, SOR of Comm’rs Mason & Smith at 5 (quoting *Reader’s Digest*, 509 F. Supp. at 1314), extends its reach so that the exemption is not limited to the usual format in which the public see or hears a press entity’s news stories, commentaries, and editorials.

Reader’s Digest held that the press exemption protected the magazine’s distribution to other press entities of a videotape featuring a computer reenactment of a traffic fatality involving a federal

⁴ *Id.* at 4-9.

⁵ Available at <http://eqs.sdrdc.com/eqsdocs/000050DC.pdf> (all Internet sites visited Jan. 17, 2007)

⁶ Available at <http://eqs.sdrdc.com/eqsdocs/000050CC.pdf>

⁷ Available at <http://eqs.sdrdc.com/eqsdocs/00004580.pdf>.

⁸ Available at <http://eqs.sdrdc.com/eqsdocs/000025B0.pdf>

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candidate. The videotape was part of a study prepared for a February 1980 *Reader's Digest* story on the fatality. Also included in the distribution were a press release and a copy of the February 1980 issue. See 509 F. Supp. at 1211-12. Although not so broad that it exempts every "dissemination or distribution using the press entity's personnel or equipment, no matter how unrelated to its press function[.]" *Reader's Digest*, 509 F. Supp. at 1214, the "legitimate press function" has been held to extend to a publisher's solicitation letter seeking new subscribers to a newsletter. The solicitation letter emphasized the publication's opposition to a certain candidate. The *Phillips Publishing* letter also sought donations to place the newsletter in college libraries, and included, *inter alia*, a combination subscription-order form and an opinion poll about a federal candidate. See *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981). As the court explained, "[b]ecause the purpose of the solicitation letter was to publicize [the newsletter] and obtain new subscribers, both of which are normal, legitimate press functions, the press exemption applies." *Id.* at 1313. Both the advertising campaign at issue in this matter, and the solicitation letter at issue in *Phillips Publishing*, involved advertising for the respective publication. Any differences in the form that advertising took is a distinction without a difference under the press exemption. The advertising campaign at issue in this matter – designed to inform the public of the merger, retain current customers and attract new ones – is legally no different than the solicitation letter at issue in *Phillips Publishing* and, therefore, that decision controls the outcome here.

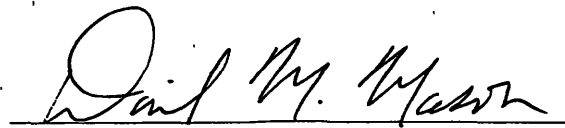
If Complainant's contention is that the *Times-Tribune* advertising was not fair and balanced, the answer is that this is not a prerequisite for the press exemption. See *CBS Broadcasting*, SOR of Comm'rs Mason & Smith at 7 (citing *In re KBHK Channel 45*, MURs 5110 & 5162, SOR of Chairman McDonald, Vice Chairman Mason & Comm'rs Sandstrom, Smith & Wold at 3 (F.E.C. July 24, 2001)⁹).

Having established the applicability of the press exemption, the truth of Complainant's allegations becomes immaterial. Although we agree with OGC's assessment of those allegations, that assessment need not have been made. Even if the *Times-Tribune* ad contained express advocacy or was coordinated with a political committee, the press exemption would apply. Obviously, where the press exemption applies, no disclaimer is needed.

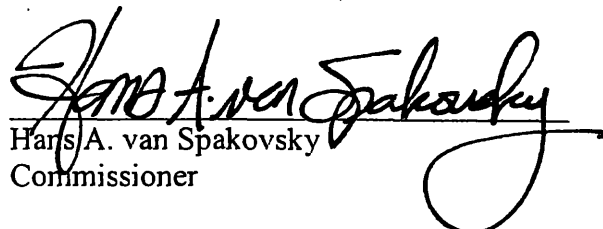
III. CONCLUSION

For the foregoing reasons the Commission was correct in finding no RTB in this matter.

April 12, 2007



David M. Mason
Vice Chairman



Hays A. van Spakovsky
Commissioner

⁹ Available at <http://eqs.sdrdc.com/eqsdocs/00000F8C.pdf>